

SPANISH LAW GOVERNING ONLINE PURCHASES OF TOURISM SERVICES

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Abstract

The purpose of this study is to analyse the level of security afforded by Spanish law to consumers purchasing tourism services on the Internet. To achieve this objective, the laws and regulations applicable to e-purchases of tourism services are identified, as is the legal status of online travel agencies. This area calls for a detailed analysis of the duties incumbent on online tourism companies with regard to the information that they are required to furnish both before and after entering into an e-contract for tourism services, as well as the rights of the consumer-tourist in relation to the e-contract for tourism services.

Keywords: *Electronic commerce, tourism services, distance, duty of information, consumer-tourist.*

Resumen

A pesar de la creciente demanda de la contratación de servicios turísticos por vía electrónica, para lograr una adecuada protección del consumidor es necesario superar las divergencias que existen entre las normas de comercio electrónico y la normativa aplicable en el ámbito de la contratación a distancia de servicios turísticos. El objetivo de este trabajo es doble porque consiste en analizar el marco jurídico aplicable en el ámbito de la contratación electrónica de los servicios turísticos y determinar el estatuto jurídico de las agencias de viaje on-line, haciendo especial referencia a los deberes que vinculan a las empresas turísticas en el desarrollo de esta actividad, tanto en relación a su identificación, como en relación a las obligaciones de información previas y posteriores a la celebración del contrato turístico por medios electrónicos, así como los derechos que le corresponden al consumidor-turista que participa en esta modalidad contractual.

Palabras clave: *Contrato electrónico, comercio electrónico, servicios turísticos, contratos a distancia, deberes de información, consumidor-turista.*

Introduction

The Internet gives companies and tourism destinations a means of offering their tourism products and services to large numbers of consumers and enables to buy them in the field of e-commerce. However, a dearth of suitable, adequate legal mechanisms to protect consumers may hinder the use of the Internet as a means of acquiring tourism products and services due to lack of consumer confidence in the information provided or the use of e-commerce to acquire these (Cavanillas 2001:4-10).

With a view to reinforcing guarantees and security in e-transactions, the legislator enacted Act 34/2002 of 11 July on Information Society Services and Electronic Commerce (in Spanish, LSSI) to incorporate the EU Electronic Commerce Directive 2000/31/EC of June on electronic commerce. This regulation is directly applicable to electronic purchases of tourism services because these are neither expressly excluded from its area of application nor governed by a specific regulation (Marquez 2011:209-242).

However, the regulation on electronic commerce is no more than one of several applicable to this field because, according to the LSSI, electronic contracts are governed by the provisions of this Regulation, by the Civil Codes and Codes of Commerce and by the remainder of civil and mercantile contract laws, particularly regulations that protect consumers and users and which govern trade activity (Article 23.2 LSSI.). This means that not only is e-commerce subject to the regulations on electronic commerce, but it is also governed by general contract law and particularly by consumer protection regulations (Cruz 2009:3-12).

It should also be noted that although the Spanish Constitution of 1978 provides jurisdiction on "promotion and regulation of tourism in their territorial area" to the Autonomous Regions (Article 148.1.18 EC), regional law does not govern the civil contractual relationships that arise in all tourism activities, which are subject exclusively to State jurisdiction in civil and mercantile matters and, specifically, to the principles of contract law (Article 149.1.6 EC). It is because of this that the regional tourism regulation does not refer expressly to electronic marketing of tourism products and/or services, these matters falling within the auspices of the civil code or codes of commerce which are matters for the state legislator (Muñoz 2011:3-15).

Given the different regulations involved, the purpose of this study is to analyse the level of regulatory certainty afforded by Spanish law to consumers purchasing tourism services on the Internet. In order to achieve this objective, the methodology used consisted of identifying the general laws applicable to e-purchases of tourism services followed by an analysis of the legal status of travel agencies operating on the Internet.

Once the general laws applicable have been identified, a detailed analysis is required of the duties and rights governing e-purchases of tourism services. To do this, the rights and duties in question are classified into three levels, these being duties arising when providing services in the information society, duties arising when entering into e-contracts for tourism services and the rights of consumers-tourists entering into e-contracts for tourism services.

Legal status of online travel agencies

Travel agencies operating online to market products and/or tourism services are deemed to offer information society services according to the provisions of the Act 34/2002 of 11 July on Information Society Services and Electronic Commerce (LSSI) (Annex a) LSSI). In this regard, this activity consists of providing a service supplied in the context of an organised activity; (normally against payment), remotely; (by electronic means) and at the individual request of a recipient (Miguel 2011:34-50).

Because of the activities of online travel agencies, these are deemed to be providing information society services. They are considered providers of information society services and are therefore subject to the provisions of Act 34/2002 of 11 July on Information Society Services and Electronic Commerce (LSSI).

Online travel agencies are deemed to be information society service providers when they directly market products and/or services offered by other operators involved in the tourism sector, in other words, acting as tourism agents, as well as in cases where the agency does not act as a direct intermediary between the company offering the tourism service and the client, but which uses this media to advertise tourism products and/or services offered in the market (Marquez 2011:209-242).

However, whilst in the former case, the agency acts as an information society services provider, in the latter it acts as a provider of data hosting and storage services and is, as such, subject to the specific obligations in Act 34/2002 of 11 July on Information Society Services and Electronic Commerce (LSSI) incumbent on this type of agency service providers.

The fact that online travel agencies are subject to the laws governing information society service providers does not, however, release them from their duty to comply with the obligations of businesses operating in the traditional market. This means that companies trading on the Internet are subject to the laws governing all businesses doing this type of trade in the market.

The first conclusion that can be drawn from this is that trading by online travel agencies is among the activities of a general nature carried out by traditional travel agencies. In this regard, both state and regional regulations governing these matters hold that the activity of travel agencies consists of organising and marketing combined package travel (Articles 150 a 165 TRLGDCU), as well as all other activities consisting of mediation and/or organisation or purchase of other services provided by tourism companies.

The regional Valencian law on tourism on this point is established in Act 3/1998, of 21 May, Tourism Law of the Valencia Region (articles. 11 and 12) and its regulation enacted by Decree 20/1997, of 11 February, of the Government of Valencia, which enacts the Regulation on Travel Agencies of the Valencia Region, which has recently been amended by Decree 63/2010, of 16 April.

Secondly, travel agencies that operate on the Internet whose legal form is itself an anonymous corporation or a limited liability company shall be subject to the legal regime established by Royal Legislative Decree 1/2010, of July 2, which enacts the amended text of the Companies Act (LSC).

Lastly, online travel agencies are subject to the administrative regulations applicable to them, particularly those governing starting and carrying out their business activities.

The administrative permit scheme applicable to travel agencies was amended by the enactment of Law 17/2009, on Free Access to Service Activities and its Exercise, which incorporated Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (Aurioles 2006:44).

Before this regulation came into force, travel agencies were required to obtain an administrative licence before starting to trade. These permits were granted by the corresponding regional governments pursuant to their jurisdiction in matters concerning regulation of tourism.

Law 17/2009, of 23 November, on Free Access to Service Activities and its Exercise abolished the requirement to obtain an administrative licence prior to engaging in tourism activities, this having been deemed a restriction on the freedom to provide services (Melagrosa 2011:47-70).

Regional provisions for which tourism regulations that have been adapted to the law protecting unrestricted provision of services merely mention the need for travel agencies to notify the corresponding government authority the "statement of responsibility" declaring that they meet the requirements to start trading which includes the information necessary to control the activity.

Duties pertaining to electronic purchases of tourism services

The provisions governing electronic commerce require information society services providers using the Internet for advertising purposes to offer their products and services to furnish their users with certain information, thus ensuring that they have sufficient information about the agency and about the characteristics of the product or service they intend to acquire, as though they were dealing with a traditional travel agency (Marquez 2011: 209-242).

This means that, given their status as information society service providers and suppliers of electronic products and services, tourism enterprises and, specifically, online travel agencies offering and/or marketing tourism products and/or services, as well as being subject to the requirements governing their trading activity, must also comply with the regulations governing electronic commerce and distance contracts.

Duties of information when providing the information society services

The first demand established in the law on e-commerce covers the duty to provide information and is binding on all information society service providers. Therefore, compliance with the duties incumbent on information society service providers applies not only to travel agencies using the Internet as a means of advertising to offer tourism products and services, but also to travel agencies using the Internet to market tourism products or services and which provide a means of entering into electronic contracts for the provision of tourism services.

Firstly, Act 34/2002 of 11 July on Information Society Services and Electronic Commerce (LSSI) establishes that all electronic service providers must provide users with easy, direct, permanent access to certain information regarding the identity of the company, which must include the following: name or company name, address or domicile of the service provider, email address and any other data that enables direct, effective communication; registry data; the legal administrative permit or details of the affidavit; fiscal information; information about the product, particularly the price and the codes of conduct to which the service provider adheres (Article 10.1 LSSI).

This measure is intended to provide all users with sufficient information about the identity of the services provider offering or marketing the online services and the place where this is established. This measure is also designed to inspire greater confidence among information society services users purchasing online products and services, because the information supplied allows service providers and users to engage in direct, effective communication.

Online travel agencies and tourism enterprises are able to supply this information by including it directly on their websites or by way of links pointing to other pages where they publish the information, provided this is easily identifiable and visible, avoiding the use of techniques that distract users' attention and insertion of these in sections that cannot be viewed directly when accessing the website (Article 10.2 LSSI). It should also be mentioned that if the purchase of the tourism product or service requires the use of services for which there is an additional fee, the provider must obtain prior, informed, express consent from the user of the service, which can be given by clicking on an icon provided for this purpose on the website (Article 10.3 LSSI).

Secondly, the regulations governing distance contracts contained in the Royal Decree Law 1/2007, of 16 November, enacting the amended text of general Law for the Protection of Consumers and Users and other complementary laws holds that not only must enterprises supply consumers with information that identifies them, but also with information about the basic specifications of the goods or services offered and their final, total price. This reference implies that online travel agencies must make express mention in the offer made on the website, if it is a stand-alone tourism product or a package travel product.

In the case of stand-alone tourism services, it must specify all the characteristics and circumstances of the service, in other words the modality of the tourism service, the characteristics of the mode of transport or accommodation and all the essential

information about the price of the tourism service as well as any additional costs deriving from the services rendered (Article 18.1 y 20. 1 TRLGDCU). If it is a package travel product, the agency or retailer must provide the user with the brochure or information programme (Article 152 TRLGDCU) which is a contractually binding offer and which must include information about the essential characteristics of the service and its final price (Pastor 2010:99-124).

Duties in relation to electronic tourism contracts

If the travel agency, as well as advertising its tourism services on the Internet, also provides electronic means of purchasing those tourism services, in other words, the facility to enter into an electronic contract, it must comply with a series of requirements and obligations to furnish the information set forth in the regulations governing electronic commerce, both prior to entering into the contract and subsequent to this, in order to give more legal security to this area.

In accordance with the provisions of Act 34/2002 of 11 July on Information Society Services and Electronic Commerce (LSSI), before entering into an electronic contract for tourism services, the travel agency involved must provide clear, understandable, unmistakable information about the following aspects: the different technical steps involved in entering into the contract, whether or not the agency does or does not register the contract and whether this can be accessed; the technical means that allow the information entered before making the order to be corrected; and the official languages of the agreement (Article 27.1 LSSI).

This information must be supplied whenever the contract for tourism services is entered into by a travel agency and a consumer-tourist, although the requirement does not apply when both parties agree otherwise and neither is a consumer or when the contract comprises a mere exchange of emails or some equivalent type of electronic message (Article 27.2 LSSI).

Compliance with this duty means that the travel agency website must supply the information about the technical steps involved in entering into the contract. The contracting process is formalized in two steps: the first is used to carry out the selection of products or data entry, and the second for the collection of information (Yáñez 2003), during which the user, before entering into the agreement, is able to the information entered, withdraw from the transaction or confirm the order (González de la Alaiza 2010).

The pre-contractual information published on the website must include specific details of the electronic personal data processing policy, applicable to the information gathered from users, and must state the purpose for which the information will be used, the consequences of providing or refusing to provide it, the possibility of exercising the right to modify or cancel the data and the electronic means provided for this purpose (Article 5 LOPD). Personal data processing also requires express consent from the owner of the information (Article 6 LOPD); therefore the agency website must have a specific icon for this purpose.

Tourism services purchased using electronic methods are also subject to general conditions which are part of the agreement, which are imposed by the organisers or retailers and govern the parties' rights and obligations (González de la Alaiza 2010). In this regard, Act 34/2002 of 11 July on Information Society Services and Electronic Commerce states that before starting the contractual procedure, the supplier of the services must provide users with the general conditions governing the electronic contract, in such a manner that these may be stored and reproduced (Art. 27.4 LSSI).

This requirement may be satisfied by the online travel agency operating by publishing general conditions directly on the webpage or by providing links to this material so that they are available to users before they eventually select the product or the service (Articles 80 TRLGDCU). Users must also declare their knowledge of these by clicking on the icon provided for the purpose (Article 5 and 7 LCGC).

In accordance with the provisions of Act 34/2002 of 11 July on Information Society Services and Electronic Commerce, once the parties have entered into an electronic contract, it is the responsibility of the travel agency or tourism enterprise offering the option on the website to comply with the requirement to confirm that acceptance of the offer has been received (Guisado 2004:154-156), doing this either by sending acknowledgement of receipt by email or any other electronic means of communication within the 24 hours after to receipt of the acceptance or immediately by another equivalent means used in the contract procedure (García-Pita y Lastres 2010), provided that the user is able to store this (Article 28.1 LSSI).

The obligation to acknowledge receipt of acceptance is considered a guarantee and even proof of the existence of a binding legal arrangement (Marquez, 2011: 233). It is when the supplier receives acceptance of the offer that the electronic contract becomes binding on the parties. In this regard, additional provision four of Act 34/2002 of 11 July on Information Society Services and Electronic Commerce establishes that distance contracts become binding when the party making the offer receives acceptance or when it is sent by the party accepting it and cannot be ignored in good faith (Articles 1262 CC. and 54 Cco).

However, the provisions governing distance contracts in Royal Decree Law 1/2007, of 16 November, which enacts the General Law for the Protection of Consumers and Users, excludes the entrepreneur's obligation to provide the consumer with written confirmation of the pre-contractual information and the general conditions and guarantees for withdrawing from the contract (Article 98 TRLGDCU) in the area of tourism contracts for the supply of accommodation services, transport, meals or entertainment, when the entrepreneur enters into such contracts to supply the service in question on a specific date or within a specific period (Article 93.2 b) TRLGDCU).

The provision therefore contradicts the obligation to acknowledge receipt of the contractual acceptance established in the regulation on electronic commerce (Fernandez, 2009:276), and the solution lies in the need for travel agencies offering online methods for purchasing tourism services to comply with the obligation to confirm the information by methods other than on paper (Cruz 2009), in the same way as applies to electronic methods (Paniza 2012).

In contrast, if it is a package travel product, the moment that acknowledgement of receipt takes place, the consumer protection law requirement for the travel agency to furnish a copy of the electronic package travel contract entered into by the parties, which contains not only the minimum contractual terms and conditions (Article 154.2 TRLGDCU) but also additional information about the package travel (Article 156 TRLGDCU), as well as measures to protect the weaker contractual parties, may be considered fulfilled (Pastor 2010).

Rights of consumer-tourists in electronic tourism service contracts

Electronic contracts for tourism services are those where the client or tourist, (consumer); visits the website of an agency or travel agency or tourism enterprise operating online to enter into a contract for tourism services using this method. This area is subject to consumer protection law which bestows a number of rights on consumers or users, among which are the rights to withdraw, as well as measures applicable to the performance of the contract.

The right to withdraw from the contract is a mechanism that protects consumers and which is designed to correctly obtain their contractual consent (Marquez 2011); which is governed by the regulation on distance contracts set forth in Royal Decree Law 1/2007, of 16 November, which enacts the amended text of the General Law for the Protection of Consumers and Users and other complementary laws (Article 101 y 102 TRLGDCU). Under exceptional circumstances, this law gives consumers the right to reconsider their decisions within seven working days of entering into the contract and to withdraw from their obligations (Fernandez 2009:122-125), without prejudice or payment of compensation of any kind, other than when the service subject to the contract is performed within this deadline (Article 102 TRLGDCU).

However, the same regulation establishes that this right does not exist in the case of certain distance purchases of tourism services, such as, for example, contracts for the supply of accommodation services, transport, meals or entertainment, when the enterprise undertakes, when entering into the contract, to provide these services on a specific date or within a specific period of time (Article 93.2 b) TRLGDCU). The reason for this exclusion is that if this right is included in electronic tourism service agreements, it will prejudice online tourism companies, because they do not have an equivalent right to withdraw from such a transaction if they have made an advance booking.

However, the same does not apply to contracts for package travel, where the right to withdraw is not excluded from consumer protection law because it is considered a contract that tends to have been organised in advance by the agency and which is normally purchased sufficiently in advance, regardless of whether the consumer has a more or less active role in the choice of the elements that make up the travel package (Article 102 b) TRLGDCU).

On the other hand, the regulations governing remote contracts contained in Royal Decree Law 1/2007, of 16 November, enacting the amended text of general Law for the Protection of Consumers and Users and other complementary laws, provide measures that govern the performance and payment of contracts entered into by an enterprise

and a consumer whereby, unless agreed to the contrary, the enterprise must execute the order within 30 days from the day following that on which the consumer and user consent to the contract (Article 103.1 TRLGDCU).

However, the same regulation excludes the application of this rule in the area of distance contracts for tourism services with regard to accommodation, transport, meals or entertainment, when the enterprise undertakes, when entering into the contract, to provide these services on a specific date or within a specific period of time (Article 93.2 b) TRLGDCU). Nevertheless, both application of the impact of failure to perform the contract and substitution of the service purchased are not excluded from these tourism contracts (Paniza 2012:24-25).

Thus, if it is not possible to provide the service purchased because it is unavailable, the consumer is entitled to recover the amounts paid within a maximum of 30 days, and to receive compensation, although once the consumer has been notified that the service is not available, the entrepreneur may provide the consumer with a similar or a superior service without increasing the price (Articles 104 and 105 TRLGDCU).

In contrast, in the case of purchases of package tours, the provisions governing remote contracts contained in Royal Decree Law 1/2007, of 16 November, which enacts the modified text of the General Law for the Protection of Consumers and Users, should also be taken into consideration with regard to changes to the price and the conditions of the travel, respectively (Marquez 2011:235), as well as the with regard to possibility of terminating or cancelling for causes attributable to the organiser of the trip or the consumer or user (Articles 159 and 160 TRLGDCU).

Conclusion

Neither the Spanish state law nor regional laws include a specific regulation applicable to online marketing of tourism products and/or services. In the light of this and assuming that state law will govern the legislation applicable to private relationships underlying tourism contracts in the future because of the exclusive jurisdiction of state law in this area, it would be pertinent for these laws to establish specific provisions applicable to e-commerce in the e-contract area based on the peculiarities of these types of agreement.

In any case, the Spanish Parliament should amend the existing regulations to resolve the conflicting rules that apply to e-contracts entered into with travel agencies and tourism enterprises offering or marketing tourism services on the Internet and the consumer protection laws. The contradiction exists because the consumer protection laws exclude the duties and rights recognised in the law on electronic purchasing in the area of distance purchases for the provision of certain tourism services, specifically those involving accommodation, transport, meals and entertainment entered into by enterprises and consumers, when these services are scheduled to take place on a specific date or during a defined period.

This legal uncertainty might be said to be hindering a climate of consumer confidence in the area of electronic purchases of tourism services, which should be taken into consideration by the Spanish legislator when making future amendments to protect consumers making remote and online purchases of this type of tourism services.

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